



THE SECRETARY OF TRANSPORTATION  
WASHINGTON, D.C. 20590

September 25, 2002

The Honorable Ernest F. Hollings  
Chairman  
Committee on Commerce, Science, and Transportation  
United States Senate  
Washington, DC 20510-6125

*Fritz:*  
Dear Mr. Chairman:

Thank you for your letter of August 13 regarding the citizenship of DHL Airways, Inc. I appreciate knowing of your continued interest in this matter.

As you know, the U.S. Transportation Code requires that to receive a certificate of public convenience and necessity an air carrier must be a U.S. citizen (49 U.S.C. 41101, 40102(a)(2)) and that it must continue to be so (49 U.S.C. 41110(e)). To enforce this continuing fitness requirement, our rules (14 C.F.R. Part 204) impose a reporting requirement that an air carrier notify us in advance and supply information about any proposed substantial change in its ownership and management. These notifications are done on an informal basis to allow us to investigate whether formal, public action will be needed to enforce the statute. Under the statute, an air carrier's certificate remains valid unless and until the Department revokes it through a public proceeding. Therefore, in these informal Part 204 investigations, when the Department has decided not to take formal action because no present or prospective compliance issue has been found, it does not issue a public order or conduct a public proceeding.

The Department has found over many years that the most effective and acceptable way to ensure that carriers comply with the law is to have the flexibility to undertake informal, non-public reviews of proposed carrier transactions before they occur. A non-adversarial process allows us to discuss problems, options, and solutions before carriers take action that might otherwise violate the statutory requirement and waste substantial monetary and other resources of the carrier and the Department. Based on our experience, the Department believes that this approach enhances compliance. Carriers would not be as forthcoming in discussing sensitive business plans before a transaction occurs if they had to do so in a public, adversarial proceeding where their competitors would have access to commercially sensitive corporate plans and documents. Of course, the Department issues a public order whenever necessary to initiate a formal, public investigation to enforce the requirement.

In the case of DHL Airways, DHL reported to the Department in late summer 2000 that it was planning to undergo a re-organization and a substantial change in its ownership. Department officials met with DHL Airways officers and counsel on numerous occasions and received documents containing confidential information concerning the corporate change and the company's relationship to DHL Worldwide

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Express (a foreign air freight forwarder owned by DHL International) and to DHL International. The reorganization plan itself changed during this investigation in response to DHL Airways' corporate needs and to DOT's recommendations made prior to its implementation. DHL Airways subsequently implemented its reorganization.

In addition, DOT officials during this time also met and talked with competing carriers (UPS and FedEx) to receive information that they deemed relevant to DOT's informal investigation. This material was included in our informal review. Additional information submitted in January 2001, when Federal Express Corporation (FedEx) and United Parcel Service Company (UPS) filed formal enforcement complaints against DHL Airways, was also fully considered in the review. However, the initial filings of UPS and FedEx in an enforcement docket were premature, as was pointed out in Order 2001-5-11, which dismissed those complaints because the Department already had the matter under review pursuant to Part 204.

In May 2002, based on the information received, the Department found that DHL Airways was actually controlled by U.S. citizens and met all statutory tests. The Department notified DHL Airways and terminated the informal enforcement investigation of its citizenship. Since formal enforcement action was not necessary, there was no public proceeding, and DOT did not notify competing carriers, who had provided us with information, of the outcome of that investigation. Congressional staff, however, were notified because of congressional interest in this matter.

As you may know, FedEx recently filed with the Department a Petition for Reconsideration or, alternatively, Review of Staff Action regarding the outcome of the Part 204 informal investigation, and UPS recently filed a separate Petition to Institute a Public Inquiry into the Citizenship and Foreign Control of DHL Airways. Both carriers submitted what they claim to be new information and requested various types of relief relating to the citizenship of DHL Airways. These two petitions have been filed in public dockets. The Department issued a notice consolidating these two petitions in Docket OST-2002-13089, and set a date of September 6, 2002, for answers to be filed. As this is a public proceeding, it would be inappropriate under the Department's rules for me to comment on the merits of this case before a final agency decision has been reached. Accordingly, I am placing a copy of your letter and my response in Docket OST-2002-13089.

You asked about the procedures for challenging an "informal decision whether within the Department or by judicial review." In cases like the review of DHL Airways' citizenship, there are procedures to request formal public review, and UPS and FedEx have recently utilized those procedures. Any party is free to file a formal enforcement complaint or a motion requesting a continuing fitness investigation. As I mentioned, both UPS and FedEx recently requested reconsideration or a new public proceeding to review the DHL situation. The statute governing the Department's aviation economic responsibilities gives the parties the right to seek judicial review of the final Department decision on the UPS and FedEx requests.

I believe that the case of DHL Airways shows that the current process is working by allowing the Department to obtain information informally to attempt to solve problems with carriers and competitors, in a way similar to that used by the Justice Department under the Hart-Scott-Rodino Act, but also to provide for public action where necessary, such as when there is an impasse. For example, where a carrier undergoing review has been uncooperative, or where there is a need to condition its certificate, the Department issues a public order or opens a public investigation. Likewise, as discussed above, an order will be issued at the conclusion of the proceeding initiated by the most recent UPS and FedEx requests.

Finally, it is my understanding that the Inspector General is reviewing the process by which the Department makes such citizenship determinations pursuant to a request by Representative Don Young, Chairman of the House Transportation and Infrastructure Committee. I will advise the Inspector General of your interest in this matter so that he can be in touch with your office.

I appreciate your concern and can assure you that the Department will continue to watch carefully to ensure that all U.S. air carriers remain in full compliance with the law requiring that they be owned and controlled by U.S. citizens. If I can provide further information or assistance, please feel free to call me.

Sincerely yours,

A handwritten signature in black ink, appearing to read 'Norman Y. Mineta', with a stylized, cursive flourish at the end.

Norman Y. Mineta

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# United States Senate

COMMITTEE ON COMMERCE, SCIENCE,  
 AND TRANSPORTATION

WASHINGTON, DC 20510-6125

August 13, 2002

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The Honorable Norman Mineta

Department of Transportation  
 400 Seventh Street, SW  
 Washington, D.C. 20590

Dear Mr. Secretary:

I write with regard to the questions that continue to be raised regarding the citizenship of DHL Airways. As you know, I have a long standing interest in this issue. Most recently, I am disturbed by allegations that the Department's review of this issue has been conducted outside the public eye and in an "informal" manner, despite the concerns raised by a number of interested parties. Such a decision making process appears to be inconsistent with the principles of an open and accountable government.

Please provide the Committee with a complete narrative as to how this decision was made, what role was given to comments of the interested parties and whether the interested parties were notified when a final decision was reached. Moreover, please discuss the procedures by which an interested party may challenge an "informal" decision whether within the Department or by judicial review.

Finally, it is my understanding that the Inspector General received a request to review the handling of this entire matter. I would greatly appreciate if you could advise my Committee staff as this review moves forward, as well as your response to any of his recommendations or findings.

With kindest regards, I am

Sincerely,

*Ernest F. Hollings*  
 ERNEST F. HOLLINGS  
 Chairman